INDUSTRIAL BOILERS & ALLIED EQUIPMENT SDN. BHD.

v.

MOHD. KAMAL JAAFAR

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. P. 526 OF 1982]
24 JANUARY 1984

CIVIL PROCEDURE: *Order for summary judgment - Order 14 - Appeal - Re-hearing in chambers and open Court - Affidavit in support of application defective - No cause of action disclosed - Triable issues.*

The plaintiffs issued a writ against the defendant claiming a sum of RM26,479.34 interest and costs. The defendant filed his statement of defence and counterclaim. The plaintiffs filed their defence to the counterclaim and applied under O. 14 for an order for summary judgment for the sum claimed. On the Registrar granting the order sought for , the defendant appealed. The appeal was dismissed upon the re-hearing of the O. 14 application in chambers. The defendant then applied for further arguments into open Court.

Held:

[1] The affidavit in support of the application for summary judgment was not defective. The deponent had identified herself as the plaintiffs' employee handling the plaintiff's accounts. She was the best person who could swear to the financial affairs of the plaintiffs. Further the deponent's omission to state expressly her belief that the defendant had no defence to the action was only a technicality which in no way affected the validity of her application.

[2] It was clear from the statement of claim that the action was based on moneys due to the plaintiffs as a result of various transactions between the parties.

[3] The triable issue arising from the counterclaim, as to whether the defendant was rightfully dismissed, had in no way any bearing on the defendant's liability for the sums due and owing to the plaintiffs.

[4] Objections to the various sums claimed must be disallowed.

[Order in chambers confirmed.]

Legislation referred to:
Rules of the High Court 1980, O. 14

For the defendant/applicant - Dennis Xavier
For the plaintiffs/respondents - V. Manokaran

JUDGMENT

Siti Norma Yaakob J:

On 9 August 1982, the plaintiffs issued a writ against the defendant claiming a sum of RM26,479.34 interest and costs. The defendant entered appearance on 11 January 1983 and on 20 January 1983 filed his statement of defence and counterclaim. The plaintiffs replied by filing their defence to the counterclaim on 8 February 1983, followed a month later on 11 March 1983, with an 'O' as in Order 14 application for summary judgment for the sum claimed, interest and costs.

After a number of adjournments, the application came before the Registrar on 19 May 1983 when Counsel for the defendant made an oral application to have himself discharged for lack of instructions. He was however asked to comply with O. 64 r. 5 of the High Court Rules and pending such formal application, the Registrar adjourned the proceedings to 2 June 1983 after informing Counsels for both parties that the O. 14 application will be heard on that date regardless of whether the defendant would be represented by Counsel or not.

On 2 June 1983, the defendant appeared in person and after hearing arguments and satisfying herself that the requirements of 'O' 14 have been fulfilled and that the defendant was trying to delay matters, the Registrar granted the order sought for by the plaintiffs. Dissatisfied with this order, the defendant appealed and upon the rehearing of the 'O' 14 application in chambers on 26 August 1983, I had dismissed the appeal and confirmed the Registrar's order. The defendant then applied for further arguments into open Court and this was heard on 18 November 1983, whereby I confirmed the earlier Order I had made in chambers for summary judgment to be entered for the plaintiffs for the sum claimed, interest and costs.

At the re-hearing of the O. 14 application, the defendant resisted it on the following grounds:

(1) that the affidavit in support of the application dated 11 March 1983, is defective as the deponent had failed to state:

(a) her authority to make the affidavit.

(b) her belief that the defendant has no defence to the action.

(2) that the plaintiffs' pleadings do not disclose any cause of action known to law.

(3) that there are triable issues.

Taking the first objection, the deponent has, in paras. 1 - 3 of her affidavit, dated 11 March 1983, identified herself as the employee who handles the plaintiffs' accounts including the accounts of the executives employed by them. Being fully conversant with the financial affairs of the plaintiffs, she is therefore the best person who can swear positively to that effect. Admittedly she has not expressly stated in her affidavit her belief that the defendant has no defence to the action but reading the second part of para. 21 of her affidavit and for other reasons which appear in the course of this judgment, it is abundantly clear that she believes the defendant has not set up any valid defence. The omission is only a technicality which I consider in no way effects the validity of her application.

Coming to the other objections, it is clear from para. 4 of the statement of claim that this action is based on moneys due and owing as a result of various transactions entered into between the defendant and the plaintiffs when he was in their employment. To escape liability, the defendant has pleaded that he was wrongfully dismissed but I consider this to be a separate issue altogether in no way related to the plaintiffs' claim for moneys due and owing. On the pleadings there is a triable issue as to whether the defendant was rightfully or wrongfully dismissed but this issue will be the subject matter of the counterclaim which the defendant has set up against the plaintiffs and which in no way has any bearing to his liability for the sums due and owing.

The total sum claimed is RM26,479.34 made up as follows:

(1) Balance of car loan, including interest, amounting to RM22,968 for which credit for RM9,500 has been given thereby, reducing the defendant's liability to RM13,468. The defendant has admitted liability in para. 5 of his statement of defence as well as in para. 3(a) of his affidavit in reply. It is not disputed that the original loan was for RM20,000 but when the purchase price of the car exceeded the amount of the loan

by RM1,427.34 the plaintiffs, at the request of the defendant, increased the loan by another RM1,427.34 and paid the full amount of RM21,427.34 to the company who sold the car. Following its purchase, the defendant had agreed to re-pay the loan by monthly instalments but apart from payment of one instalment, the defendant failed to keep up to his promise and when he left the plaintiffs' employment, there was a sum of RM22,928 due and owing from him. Despite repeated demands, the defendant refused to make payment and pursuant to the agreement between them, the plaintiffs sold the car to a used car company for RM9,500. The defendant now questions the sum realised on the sale of his car as being too low and that the plaintiffs did not get a good market price for it, as the distributors of the car have valued it for RM15,000. It must be remembered that the distributors never examined the car and the defendant has only himself to blame for ignoring the plaintiffs' demand for payment. As it is, the car was examined and valued by the used car company and since there is nothing to suggest any complicity between the plaintiffs and the used car company that there was conspiracy to give a low price, I consider that the plaintiffs had acted honestly in enforcing their rights. As far as I can see, the plaintiffs have not in any way acted adversely towards the defendant's interest.

(2) The sum of RM140 being the price of a car alarm which the defendant had installed in the car. The defendant maintains that credit does not arise in this case as the car was returned to the plaintiffs together with the alarm. The issue here is whether the sum represented a loan made by the plaintiffs to the defendant or whether the plaintiffs agreed to install the alarm to the defendant's car. From exhibit TKB8 attached to the plaintiffs' affidavit, it is clear that 3 alarms were purchased by the plaintiffs for 3 vehicles for which the plaintiffs' car was not one. However, when one of the three cars could not be fitted with the alarm, the defendant installed the alarm in his car instead with a promise the he would repay the RM140 to the plaintiffs being the cost of the alarm. From the minute endorsed in the same exhibit, it is clear that the sum of RM140 was an advance made by the plaintiffs to the defendant for which credit does arise and for which the plaintiffs have every right to demand.

(3) An interest free loan of RM1,960.85 given by the plaintiffs to the defendant for which liability is admitted.

(4) A sum of RM2,400 being expenses incurred on an American Express Credit Card issued by the plaintiffs to the defendant which is also admitted by the defendant.

(5) A sum of RM3,813.25 being medical expenses incurred by the defendant's wife and which was paid by the plaintiffs. Although the defendant admits that the terms of his employment do not extend free medical treatment to his wife, he maintains that there was an oral variation in the terms and conditions of his service to that effect whereby he can pledge the plaintiffs' credit for all medical expense incurred by his wife. The defendant joined the plaintiffs' establishment on 1 November 1980 and the medical expenses were incurred 7 months later pursuant to bill No. A.12339 dated 10 July 1981 from Pantai Medical Centre and bill No. 1929 dated 8 July 1981 from Steruda Sdn. Bhd. It seems highly improbable that in less than a year of his employment, the plaintiffs would be generous enough to have extended free medical treatment to his wife when the terms of his employment contained in Exhibit TKB 17 attached to the plaintiffs' affidavit state that the defendant "alone will be entitled to free medical attention and treatment". From the very nature of the words used in his

terms of employment, he must be aware that any variation in the term of his employment pertaining to free medical treatment must be evidenced in writing. Since there was none, I can only say that this is yet another attempt by the defendant to escape liability. In this respect, the plaintiffs, although not obliged to do so, had gone out of their way to assist the defendant, an executive in their company, and for this, the defendant must account for all payments made towards settlement of his wife's medical expenses.

(6) A sum of RM3,000 advanced by the plaintiffs to the defendant to enable the defendant to obtain membership at Selangor Club.

(7) A sum of RM1,697.24 being electricity, water and telephone bills incurred by the defendant for which payments were made by the plaintiffs. For transactions 6 and 7 above, the defendant raised the same objections as in transaction 5 and for the same reasons, I had disallowed his objections and hold that he must account for such payments made by the plaintiffs on his behalf.

To that end, I had allowed judgment to be entered against the defendant for the sum claimed, interest and costs.

Also found at [1984] 1 CLJ 247